IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2012

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Criminal Appeal No.843 of 1998

T.C.Loganathan .. Appellant

Vs

State Rep. By
CBI/ACB,
Chennai. .. Respondent

Prayer:- Criminal Appeal filed under Section 374 Cr.P.C., against the judgment of the learned X Additional Sessions Judge, Chennai dated 22.10.1998 in C.C.No.136 of 1997.

For Appellant : Mr.M.Ravindran

For Respondent : Mr.N.Chandrasekaran,
Special Public Prosecutor (CBI)

JUDGEMENT

The appellant is the accused in C.C.No.136 of 1997 on the file of the learned Special Judge under the Prevention of Corruption Act (CBI cases, X Additional Sessions Judge), Chennai. The trial Court, by judgment dated 22.10.1998, convicted the appellant and sentenced him as detailed below:-
Charge Nos.
Offence
Punishment
1

Under Section 409 I.P.C.,
Five Years R.I and Rs.5,000/- fine i/d 6 months R.I.
2
Under Section 420 I.P.C.,
Three Years R.I and Rs.3,000/- fine i/d 3 months R.I.
3
Under Section 477-A I.P.C.,
Three Years R.I and Rs.3,000/- fine i/d 3 months R.I.
4
Under Section 477-A I.P.C.,
Three Years R.I and Rs.3,000/- fine i/d 3 months R.I.
5

Under Section 420 I.P.C.,
Three Years R.I and Rs.3,000/- fine i/d 3 months R.I.
6
Under Section 467 I.P.C.,
Five Years R.I and Rs.5,000/- fine i/d 6 months R.I.
7
Under Section 468 I.P.C.,
Three Years R.I and Rs.3,000/- fine i/d 3 months R.I.
8
Under Section 471 r/w 465 I.P.C.,
One Year R.I and Rs.1,000/- fine i/d 1 month R.I.
9
Under Section 201 I.P.C.,
Two Years R.I and Rs.2,000/- fine i/d 2 months R.I.
10
Under Section 13(1)(c)&(d)
r/w 13(2) of PC Act
Two Years R.I and Rs.2,000/- fine i/d 2 months R.I.

Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2.The case of the prosecution in brief is as follows:-

P.W.3 was residing at No.1, Vembuli Amman Nagar, Palavanthangal, Chennai. P.Ws.4 and 5 are his sisters. All the three were residing together at the above address. The appellant was working in Indian Oversea Bank, Nazarathpet Branch as Casheer during the year 1991 and 1992. The appellant studied Pre University Course with P.W.3. Thus, the appellant had acquaintance with P.W.3. Using the said friendship, the appellant used to meet P.W.3 and requested him to deposit some amount in his Bank. Accordingly, P.W.3 deposited a sum of Rs.20,000/- in his name and Rs.10,000/- each in the name of his sisters namely P.Ws.5 and 6. Thereafter, on 29.08.1991, he opened a Savings Bank account in A/c No.6966 in Indian Overseas Bank, Nazarapet Branch, where the appellant was working as a Casheer. The appellant only introduced P.W.3 to the Bank by signing Exhibit P.28. As soon as the account was opened, Rs.20,000/- was deposited by P.W.3 into the said account. On the same day, two other accounts vide A/c Nos.6964 and 6967 were opened in the names of P.Ws.4 and 5 respectively. P.Ws.4 and 5 however did not come to the Bank; only necessary documents were taken to their house; filled up and their signatures were obtained by P.W.3. However, P.Ws.4 and 5 were also introduced to the Bank only by the appellant by signing the necessary documents.
3.According to the prosecution, the appellant who was Incharge of the records and cash of the Bank, on 18.12.1991, made debit entry of Rs.7,000/- and on 26.06.1992, he made debit entry of Rs.10,000/- in the account of P.W.4. On the same day, on 19.02.1992, he withdrew a sum of Rs.2,500/- from the account of P.W.4 by means of withdrawal slip by forging her signature. Again on 05.06.1992, by using the forged withdrawal slip, he withdrew Rs.10,000/- from the account of P.W.4. Thus, by making false entries and by forging signature on the withdrawal slips, the appellant had withdrawn Rs.12,500/- from the account of P.W.4. Similarly, in the account of P.W.3-Mr.Kumar, the appellant made debit entries of Rs.5,000/- on 03.10.1991; Rs.10,000/- on 12.01.1991 and Rs.10,000/- on 11.08.1992. Then by using forged withdrawal slips, he withdrew Rs.20,000/- on 20.07.1992 from the account of P.W.3. In the account of P.W.5, (In A/c No.6967) on 11.02.1992, he made debit entry to the tune of Rs.4,900/- and on 08.09.1992 he withdrew Rs.5,000/- by using a forged withdrawal slip. Thus, according to the prosecution, the appellant had misappropriated a total sum of Rs.94,400/- from the accounts of these three persons namely, P.Ws.3 to 5.

4.P.W.18 was the Inspector of Police, CBI/ACB, Chennai. During the year 1992, he received credible information about the alleged offences committed by the appellant. He registered a case in Crime No.R.C No.44(A)/92 on 16.10.1992 at 8.00 p.m., under Sections 420, 467, 468, 471 I.P.C., and 13(2) r/w 13(1)(d) of PC Act, 1988. Exhibit P.89 is the F.I.R. Taking up the case for investigation, he proceeded to the Bank and recovered the relevant documents. Further, he examined P.Ws.3 to 10 and recorded their statements on 13.11.1992. On 27.11.1992, he obtained the sample signatures of P.Ws.3 to 5 for the purpose of comparison by an Expert. On 18.12.1992, he sent the disputed documents along with the admitted signatures for comparison. He obtained the initials and signatures of the said witnesses in 34 sheets (Exhibit P.6) in the presence of P.W.11 and another witness. P.W.22-the Hand Writing Expert, examined the disputed documents with the admitted signatures and opined that the signatures found on the disputed documents namely, the vouchers were not made by P.Ws.3 to 5. P.W.19, succeeded P.W.18. He obtained sanction from P.W.1 as required under Section 19 of the Prevention of Corruption Act and laid final report against the appellant.

5.Based on the above materials, the trial Court framed the following charges:-
Charge No.1 - Under Section 409 I.P.C.,
Charge No.2 - Under Section 420 I.P.C.,
Charge No.3 - Under Section 477(A) I.P.C.,
Charge No.4 - Under Section 420 I.P.C.,
Charge No.5 - Under Section 477(A) I.P.C.,
Charge No.6 - Under Section 467 I.P.C.,
Charge No.7 - Under Section 468 I.P.C.,
Charge No.8 - Under Section 465 I.P.C.,
Charge No.9 - Under Section 201 I.P.C.,
Charge No.10 - Under Section 13(1)(c)&(d)
r/w 13(2) of PC Act.

6.When the appellant was questioned in respect of the above charges, he denied the same as false. The trial Court therefore, proceeded with the trial. As many as 19 witnesses were examined and 97 documents were exhibited on the side of the prosecution. P.W.1 has spoken to about the sanction issued by him under Exhibit A.4 for prosecuting the appellant. P.W.2 was the Branch Manager of Indian Overseas Bank, Nasarathpettai Branch. He has spoken to the fact that the appellant was the only Casheer during the relevant period dealing with the records and cash. Through this witness, the applications given by P.Ws.3 to 5 for opening the Savings Bank Account and the other records pertaining to the same have been marked. He has also spoken to about the debit entries in the savings bank accounts of P.Ws.3 to 5 and also the withdrawals of the money from the said accounts. P.Ws.3 to 5 have spoken to the fact that money kept in their accounts had been fraudulently withdrawn without their knowledge. P.W.6 was an Officer in the said Branch. She has spoken to the fact that under the withdrawal slips in question, money was paid to the appellant as he was holding the pass books of P.Ws.3 to 5. P.W.7 as a Cashier in the said Bank. She has spoken to about the entries in the pass books of P.Ws.3 to 5 and other relevant facts. P.W.8 was the Branch Manager of the said Bank during the relevant period. He has spoken to about the Exhibits P.14,15 & 32 to 38 which were filled up by the appellant. He has spoken to the fact that the documents were filled up only by the appellant though the savings bank accounts were in the names of P.Ws.3 to 5. P.W.10 was working as Special Assistant in the Bank during the relevant period. After the transfer of the appellant from the said Branch, when he examined the accounts in general, more particularly, the accounts of P.Ws.3 to 5, he found the mal-practices committed by the appellant. P.W.17 has spoken to about his expert opinion regarding the hand writing of the witnesses.

7.When the appellant was questioned under Section 313 Cr.P.C., in respect of the incriminating

circumstances, he denied the same as false. But he has not specifically taken any plea regarding the above facts spoken to by the witnesses and his denial was more in general. Further, the appellant did not choose to examine any witness nor did he mark any documents on his side. Having considered all the above, the trial Court found him guilty and punished him under all the charges as detailed in the first paragraph of this judgment. Challenging the said conviction and sentence, the appellant has come up with the present criminal appeal.

8.Earlier, this appeal was heard by a learned Single Judge of this Court. During the course of arguments, the learned counsel for the appellant had assailed only the sanction order issued by P.W.1. The other grounds had not been put forth by the learned counsel for the appellant. Having considered the same, by judgment dated 25.04.2006, this Court held that the sanction order was not issued by the competent authority. In other words, P.W.1 was not the competent authority to issue such sanction order. Accordingly, this Court allowed the appeal and set aside the conviction and sentence imposed on the appellant. However, this Court granted liberty to the respondent to obtain fresh sanction from the competent authority and then to file final report, if so advised.

9.Aggrieved over the same, the respondent/CBI/ACE, Chennai took up the matter on appeal before the Hon'ble Supreme Court. In Criminal Appeal No.310 of 2007, by judgment dated 25.11.2010, the Hon'ble Supreme Court has set aside the judgment of this Court and remanded the matter back to this Court. The operative portion of the said judgment reads as follows:-
"As the High Court has not gone into the appeal on merits of the controversy and has confined its decision only to the question of sanction, we deem it appropriate that the matter be remanded to the High Court for fresh decision leaving all questions open for discussion.
We accordingly set aside the order of the High Court with the above direction.
We make it clear that despite the fact that we are allowing this appeal and setting aside the order of the High Court, it should not be held to mean that this order has any reflection on the merits of the controversy either on the question of sanction or on the merits of the case."

Thereafter, as per the order of the Hon"ble Chief Justice, this appeal has been listed before me for disposal.

10.I have heard the learned counsel for the appellant and the learned Special Public Prosecutor for the respondent and also perused the records carefully.

11.Though several grounds have been raised in the appeal memorandum, the learned counsel for the appellant would submit that he does not press for any adjudication in respect of the veracity of the evidences of prosecution witnesses. The learned counsel for the appellant would submit that having convicted the appellant under Section 409 I.P.C., the trial Court ought not to have convicted him under Section 420 I.P.C. He would further submit that in respect of the conviction under Section 477(A) I.P.C., the appellant has been convicted on two counts whereas, the entire materials would go to show that there is only a single offence under Section 477(A) I.P.C., made out. The learned counsel would further submit that having convicted the appellant under Section 471 I.P.C., the trial Court out not to have convicted the appellant under Sections 467 and 468 I.P.C. The learned counsel would further submit that the offences under Section 13(1)(c)&(d) of Prevention of Corruption Act, will not go together. He would further submit that absolutely, there is no evidence to show that the appellant has committed an offence under Section 13(1)(c)&(d) r/w 13(2) of PC Act. At the end, he would submit that having regard to the age of the appellant, the fact that he has got two marriageable daughters, his family situation etc., some leniency may be shown in the matter of punishment.

12.The learned Special Public Prosecutor would however oppose this appeal. He would submit that by means of oral as well as documentary evidences, the prosecution has proved the case beyond reasonable doubt. Therefore, according to him, no interference need be made by this Court in the said findings of the trial Court. He would further submit that the quantum of punishment imposed by the trial Court on the appellant cannot be stated to be on the higher side.

13.I have considered the rival submissions.

14.From the evidence of P.Ws.3 to 5, it is crystal clear that they did not withdraw any amount which are covered in the charges. Absolutely, there is no reason to disbelieve the evidences of P.Ws.3 to 5. The evidence of Hand Writing Expert would go to show that the signatures found in the withdrawal slips were not made by P.Ws.3 to 5. The evidence of the Expert also clearly goes to corroborate the evidences of P.Ws.3 to 5.

15.It is the evidence of P.Ws.6,7,8,9 and 10 that the records in question were all maintained only by the appellant. It has also been proved through these witnesses that the appellant only handled the pass books of P.Ws.3 to 5; made debit entries in the said accounts and received the amount under the withdrawal slips in question. The learned counsel for the appellant himself does not seriously dispute the evidences of these witnesses. The trial Court has given cogent reasons to believe these evidences coupled with the evidences of P.Ws.3 to 5 to come to the conclusion that the appellant has committed these illegalities.

16.The learned counsel for the appellant would submit that having convicted the appellant under Section 409 I.P.C., for the very same act, he should not have been convicted for offence under Section 420 I.P.C. In my considered opinion too, Section 409 and 420 I.P.C., cannot go together. One of the essential ingredients of Section 409 I.P.C., is □trust□ reposed whereas, under Section 420 I.P.C., the basic element is deception. In an offence under Section 420 I.P.C., there is no trust reposed. When such trust reposed is breached, it becomes an offence under Section 409 I.P.C. Whereas, when the person so deceived, acts upon such deception then it becomes an offence under Section 420 I.P.C.

17.From the facts narrated above, I am sure that absolutely there is no evidence of deception satisfying the basic requirements of Section 420 I.P.C. But there is only evidence to prove that the appellant was entrusted with the money and documents. He has committed breach of the said truth. Therefore, the offence under Section 409 I.P.C., has been clearly established. In such view of the matter, the conviction of the appellant under Charge No.1 for offence under Section 409 I.P.C., needs to be confirmed. The conviction of the appellant for offence under Section 420 I.P.C., under Charge Nos.2 and 5 is liable to be set aside.

18.Now coming to the offence under Section 477(A) I.P.C., under Charge Nos.3 and 4, for the single count, the accused has been convicted and punished twice. In my considered opinion, the evidence let in by the prosecution witnesses would go to show that the offence under Section 477(A) I.P.C., single count alone has been proved. Therefore, the conviction of the appellant under Section 477(A) I.P.C., for single count, (Charge No.3) needs to be sustained. The conviction under Section 477(A) I.P.C., under Charge No.4 needs to be set side.

19.Now coming to the Charge No.8, for offence under Section 471 I.P.C., rightly, he has been convicted. Having convicted the appellant under Charge No.8, under Section 471 I.P.C., the trial Court ought not to have convicted the appellant under Sections 467 and 468 I.P.C., (vide Charge Nos.6 and 7). Offence under section 471 I.P.C., is a major offence which includes the other offences. Therefore, the conviction under Charge No.8 for offence under Section 471 I.P.C., needs to be

confirmed but the conviction for offence under Sections 467 and 467 under Charge Nos.6 and 7 needs to be set aside.

20.The conviction under Charge No.9: for offence under Section 201 I.P.C., there is evidence to prove that the appellant destroyed the documents. Therefore, the conviction for offence under Section 201 I.P.C., needs to be confirmed.

21.Now coming to the conviction under Charge No.10, for offence under Section 13(1)(c) & (2) r/w 13(2) of PC Act, absolutely, there is no evidence for proving a misconduct as defined in Section 13(1)(d) of the PC Act. But there is evidence to convict the the appellant under Section 13(1)(c) r/w 13(2) of PC Act. To that extent, the conviction needs to be modified.

22.Yet another argument advanced by the learned counsel for the appellant was that when there is conviction under Section 409 I.P.C., there cannot be a separate conviction and punishment under Section 13(1)(c) of the PC Act. This argument cannot be accepted in view of the law laid down by the Constitution Bench of the Hon'ble Supreme Court in Om Prakash v. State of U.P ((S) AIR 1957 SC 458). In that case before the Constitution Bench of the Hon'ble Supreme Court, the precise question was, whether Section 409 of Indian Penal Code insofar as it applies to a public servant, has been impliedly repealed by the enactment of Section 5(1)(c) and 5(2) of the Prevention Act, 1947. The Constitution Bench of the Honble Supreme Court at the earlier stage of the judgement has tabulated the different elements constituting the two offences and held that they are two different offences and they do not overlap each other. In paragraphs 27 & 28 of the judgement, the Hon'ble Supreme Court has held as follows:-

"27. We now proceed to consider whether the two sections are identical in essence, import and content and in our opinion the argument on behalf of the State carries much force when it is suggested that by enacting the Amending Act of 1952 and creating sub s.(4) to s.5 the legislature specifically stated that the offence under s. 5 (1) (c) is different from any previous existing offences under any penal statute and there can, therefore, be no scope for speculation about repeal. The words used in sub-s.4 "any other law " made the position quite clear and explicit. Other law does not mean identical law in which case the word 'other' will have no meaning. At an earlier stage of this judgement we have already tabulated the different elements constituting the two offences and a clear comparison and contrast of these elements would show that an offence under s. 405, Penal Code is separate and distinct from the one under s. 5 (1) (c). There are three points of difference between s. 405, Penal Code and s. 5 (1) (c). The dishonest misappropriation contemplated in s. 405,Penal Code is different; whereas that under section 5 (1) (c) is either dishonest misappropriation or fraudulent misappropriation. The latter section is much "wider in amplitude than the former. In s.405, Penal Code the words used are "In violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied." There are no such expressions in s. 5 (1)(c). It is clear, therefore, that whereas under s. 405 of the Indian Penal Code there are three essential ingredients to constitute the offence; each one of them being separate and distinct, in s. 5(1)(c) there are only two. Now considering s. 5(1)(c) there are certain matters in it which are absent in s. 405, Penal Code. The words 'dominion' and 'entrustment' connote two different things. The word 'dominion' is not in s. 5(1)(c). We have already stated that the word 'fraudulently' is not present in s. 405 and in s. 5(1)(c) the gist of the offence can also be made out if the offender allows any person so to do, i.e., allows any person to derogate from the law as contemplated in the earlier portion of the section. The meaning put on the word 'allows' would 'certainly be different from 'dishonest misappropriation' by the offender himself. It may be that the word can mean allowing by negligence or without any volition on the part of the offender. It may also mean that there is some kind of positive and tacit acquiescence necessary to bring home the offence. In any event, allowing other persons so to do does not find a place in s. 405, Penal Code

though this section also contemplates "wilfully suffering any other person so to do." There is an essential difference between " allowing " a person and "wilfully suffering" a person to do a certain thing.
28. There can, therefore, be no doubt whatever that s. 5(1)(c) of the Prevention of Corruption Act creates a new offence called "criminal misconduct" and cannot by implication displace the offence under s. 405, Penal Code. In this connection it is useful to compare ss. 5(1)(a) and 5(1)(b) with ss. 161 and 162, Penal Code. As has already been referred to, these two sections are aggravated forms of ss. 161 and 162, Penal Code and the intention cannot be to abrogate the earlier offence by the creation of the new offence. These two offences can co-exist and the one will not be considered as overlapping the other. A course of conduct can be proved when a person is arraigned under ss. 5(1)(a) and 5(1)(b), but such a course is impossible to be let in evidence when an offence under ss. 161 and 162 is being enquired into or tried. Similarly there are a number of elements which can be proved in an inquiry or trial under s. 5(1)(c) that cannot be let in by the prosecution when a person is charged for an offence under s. 405, Penal Code. In s. 405, Penal Code the offender must wilfully suffer another person to misappropriate the property entrusted, but in s. 5(1)(c) if he allows another person to dishonestly or fraudulently misappropriate or otherwise convert for his own use any property so entrusted, then it is an offence. There is a vast difference between wilfully suffering another and allowing a person to do a particular thing and in our view the word "allows" is much wider in its import. Wilfully pre-supposes a conscious action, while even by negligence one can allow another to do a thing."

23. Section 5 (1) (c) of the Prevention of Corruption Act, 1947 has been verbatim reproduced in Section 13 (1)(c) of the Prevention of Corruption Act. In view of the law laid down by the Constitution Bench of the Hon'ble Supreme Court in the above said case, I have no hesitation to hold that Section 409 of IPC and Section 13 (1)(c) r/w 13(2) of the Prevention of Corruption Act, 1988 will very well coexist and, therefore, the conviction under both the provisions and the sentence imposed under both the provisions are not illegal.

24.Now coming to the quantum of punishment, the learned counsel for the appellant would submit that the appellant is now aged around 69 years and he has got two marriageable daughters. He would further submit that the family of the appellant is in penury. At this stage, if the appellant is sent to the prison, his entire family will be left in lurch. Therefore, the learned counsel would plead for mercy in the matter of imposing punishment on the appellant.

25.Having regard to the above facts, which are not disputed by the learned Special Public Prosecutor, I am of the view that the substantive sentence of imprisonment imposed by the trial Court may be modified at the same time, the fine amount needs no interference. Accordingly, the sentence is modified as follows:-
(i) Under Charge No.1, for offence under Section 409 I.P.C., the conviction is confirmed and the appellant shall undergo rigorous imprisonment for one year instead of 5 years as imposed by the trial Court. The fine amount and the default sentence are confirmed.

(ii) Under Charge No.3, for offence under Section 477(A) I.P.C., the conviction is confirmed and the appellant shall undergo rigorous imprisonment for one year instead of 3 years as imposed by the trial Court. The fine amount and the default sentence are confirmed.

(iii) Under Charge No.8, for offence under Section 471 r/w 465 I.P.C., the conviction and sentence as imposed by the trial Court that rigorous imprisonment for one year and fine amount of Rs.1,000/- and in default to undergo one month rigorous imprisonment, are confirmed.

(iv) Under Charge No.9, for offence under Section 201 I.P.C., as imposed by the trial Court that

rigorous imprisonment for two years and fine amount of Rs.2,000/- and in default to undergo two months rigorous imprisonment, are confirmed.

(v)Under Charge No.10, the conviction and sentence imposed for offence under Section 13(1)(c) & (d) r/w 13(2) of PC Act, is modified and there shall be conviction under Section 13(1)(c) r/w 13(2) of PC Act alone and he shall undergo rigorous imprisonment for one year instead of two years as imposed by the trial Court. The fine amount and the default sentence as imposed by the trial Court are confirmed.
(vi)The conviction and sentence imposed on the appellant for offence under Section 420 I.P.C., under Charge Nos.2 and 5; the conviction and sentence imposed for offence under Section 477-A I.P.C., under Charge No.4 and the conviction and sentence for offence under Sections 467 and 468 under Charge Nos.6 and 7 are set aside and the appellant is acquitted under the said charges.

(vii)The sentence imposed herein under various charges shall run concurrently and the period undergone shall be set off.

25.The Criminal Appeal is allowed in part as indicated above.

28.03.2012
jbm

Index: Yes/No

Internet: Yes/No

To

1.The X Additional Sessions Judge,
Chennai.

2.The Public Prosecutor,
High Court, Madras.

S.NAGAMUTHU,J
jbm

Pre Delivery Judgment made ibn
Crl.A.No.843 of 1998

28.03.2012